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No. 99-948

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CLAUDE CIMINO, ET AL.,

Petitioners,

v.

PITTSBURGH CORNING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the Petition for Certiorari, Petitioners Claude Cimino, *et al.* demonstrated that this Court's plenary review is urgently needed to address the confusion and conflicts created by the decision below and to reaffirm the fundamental statutory limits on the ability of the Judicial Panel on Multidistrict Litigation to order the transfer of cases already in trial in which the common questions of fact and law have already been resolved.

1. Pittsburgh Corning's chief argument in its Brief in Opposition is that the Petition for Certiorari presents only "the factual questions of whether there remain 'common issues' to be tried, whether the cases are once 'again in a pretrial status,' and whether or not transfer serves the convenience of the parties and witnesses and is conducive to judicial efficiency." Opp. Cert. 9.

That is flatly wrong. The Eastern District of Texas has held that the "common issues" have been resolved by the Phase I findings and that the cases are *not* in a pretrial status. The Eastern District of Texas held that "the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier." App. 12a. "Because the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages [i]n 143 cases. *The phase I or liability part of the trial of all of these cases has been completed.*" App. 13a (emphasis added).

Indeed, elsewhere Pittsburgh Corning acknowledges that the Eastern District of Texas has resolved these issues. Opp. Cert. 5. Pittsburgh Corning is simply trying to re-litigate before this Court matters which have been decided by the Texas district court. Thus, Chief Judge Becker indicated that he would have granted rehearing of the Third Circuit's decision, on the ground that "the Judicial Panel on Multidistrict Litigation abused its discretion in determining

that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court." App. 16a-17a n.2. He opined that "the only causation questions remaining [are] those relating to individual damages determinations." *Id.*

The Third Circuit purported to identify open "issues of causation" with respect to some of the plaintiffs and "additional questions of damages with respect to damages" with respect to other plaintiffs. App. 6a. But as already noted in the Petition for Certiorari (with no contradiction by Pittsburgh Corning) any additional discovery that may be needed, such as "updated medical records" for damages (App. 14a), or individual exposure data relating to causation, will not involve any issues in common with asbestos cases consolidated in the Eastern District of Pennsylvania. Any further discovery that may be needed in this proceeding will relate to individualized questions and should be pursued in Texas, not in Pennsylvania.

In fact, Pittsburgh Corning goes to great lengths to complain that discovery in these cases entails inconvenient trips "to Beaumont Texas to examine approximately 100 plaintiffs per day." Opp. Cert. 1. Pittsburgh Corning also insists that discovery must be undertaken into conditions at local "refineries and shipyards" in Texas. Opp. Cert. 13. *See also id.* at 18 (it is "true" that "exposure and causation are generally regarded as individualized issues"). Obviously, such discovery should be pursued in the Eastern District of Texas, not in Philadelphia.

2. Pittsburgh Corning suggests that the Third Circuit was free to repudiate the holding of the Eastern District of Texas because, as a technical matter, "[a] transferee judge may reconsider decisions of the transferor judge." Opp. Cert. 15 n.10. But the MDL process is not a substitute for appeal (in this case, to the Fifth Circuit) or a mechanism for collateral attack on a federal district court order. As these cases come to this Court (and as they came before the Judicial Panel), the

Eastern District of Texas Order has not been set aside. Under that Order, it is impossible to find that there are any common questions of fact; that transfer would serve the convenience of parties and witnesses; or that transfer would promote the just and efficient conduct of the litigation.

Pittsburgh Corning's argument only *proves petitioners' point*. Pittsburgh Corning has sought and supported transfer as a thinly veiled attempt at forum shopping. Dissatisfied with the Eastern District of Texas' holding that the common issues have been decided by the Phase I jury verdicts, Pittsburgh Corning wants another bite at the apple in the Eastern District of Pennsylvania.

The transfer in this case precipitated an unseemly jurisdictional tug-of-war between the Eastern District of Pennsylvania and the Eastern District of Texas. According to the Texas district court, "[t]he phase I or liability part of the trial of all of these cases has been completed." App. 13a. According to the Third Circuit, the cases are in a "pretrial" posture. App. 3a. Transfer was ordered after the Texas district court had issued a case management order to resolve these cases promptly through mini-trials beginning in May 1999. It is now more than six months later, with no end in sight. For Pittsburgh Corning to defend the transfer on the ground that the Third Circuit was entitled to thumb its nose at the Eastern District of Texas only heightens the need for this Court's review.

Law of the case is a doctrine that precludes the relitigation of issues within the context of a single case once they have been decided, in the absence of extraordinary factors such as an intervening decision of a higher court, newly available relevant evidence, clear legal error, or manifest injustice. *See Messinger v. Andersen*, 225 U.S. 436, 444 (1912); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). These principles have *more* force, not *less*, in the transfer context. "[J]udges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other." *Hayman Cash Register*, 669 F.2d at

168 (quoting *TCF Film Corp. v. Gourley*, 240 F.2d 711, 713 (3d Cir. 1957)).[1]

As one court has explained:

> The rule of the law of the case is a rule of practice, based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter.... This principle is particularly applicable to multidistrict litigation in which the presence of a large number of diverse parties might otherwise result in constant relitigation of the same legal issue. Nor is there any apparent reason why the rule of the law of the case should not be applied merely because a different judge has now been assigned to this litigation.

Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp., 323 F. Supp. 381, 383 (E.D.Pa.1970). *See also In re Penn Central Sec. Litig.*, 62 F.R.D. 181, 187 (E.D. Pa. 1974) (enforcing transferor court's order requiring pleading that transferee court believed was unnecessary); *In re Master Key Antitrust Litig.*, 320 F. Supp. 1404, 1407 (J.P.M.L. 1971) ("the parties will, of course, be expected to comply with all orders entered prior to transfer");

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[1] *See also Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979) (quoting *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964)) (law of the case eliminates the potential unseemliness of a court altering a legal ruling as to the same litigants with the danger that this may reflect only a change in the membership of the tribunal); *Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 904-05 (5th Cir. 1972) (rule that successor judge should not overrule her predecessor's decisions is essential to respectable administration of the law, to speed conclusion of litigation and to prevent unseemly conflicts); *Hardy v. North Butte Mining Co.*, 22 F.2d 62, 63 (9th Cir. 1927) (quoting *Appleton v. Smith*, 1 Fed. Cas. 1075, No. 458) ("It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence."); *In re Plantation Manor Restaurant*, 45 Bankr. 229, 231 (Bankr. E.D. & W.D. Ark. 1984) ("the reversal of one coordinate judge by another can only stultify the law and cheapen the judicial process").

ABC Great States, Inc. v. Globe Ticket Co., 316 F. Supp. 449, 451 (E.D.Pa.1970) (applying law of the case in § 1407 context).

The very cases cited by Pittsburgh Corning note that "[t]he doctrine of the law of the case has its application in multidistrict litigation as well as in traditional litigation." *In re Multi-Piece Rim Products Liability Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981). The authorities cited by Pittsburgh Corning involve a transferee judge's ability to take changed circumstances into account in the management of discovery. But there are no changed circumstances warranting the re-examination of the holding by the Texas district court that the Phase I jury findings conclusively resolved the common issues in this proceeding.

3. Even absent law of the case, it is plain that the December 2 Order of the Eastern District of Texas is correct. Pittsburgh Corning's position is that Phase I of the *Cimino* trial plan resolved only the claims of ten class representatives and produced no class-wide findings applicable to all plaintiffs. That is false. In *Cimino v. Raymark Industries,* 151 F.3d 297 (5th Cir. 1998), the Fifth Circuit held that Phase I was not only "a complete jury trial of the entire individual cases of the ten class representatives," but "also *a class-wide determination* of issues of product defectiveness, warning, and punitive damages (including a multiplier as to each defendant)." *Id.* at 299-300 (emphasis added). The Court of Appeals reaffirmed (*see id.* at 302 & n.10) that Phase I was nothing more than the *class-wide* adjudication of liability issues it had approved in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986) ("common questions" would be "resolved *for the class*") (emphasis added), and *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), where the Fifth Circuit approved "a single trial" for all plaintiffs on liability issues. 893 F.2d at 708. Thus, in *Cimino*, the Fifth Circuit affirmed the unanimous Phase I jury findings, declaring "we reject all of its [Pittsburgh Corning's] contentions on appeal

except that relating to the date on which prejudgment interest commences to accrue." 151 F.3d at 335. The court expressly rejected Pittsburgh Corning's complaint as to the punitive damage multiplier. *Id.* at 323, 329, 335.

The Fifth Circuit's reversal of the judgments in the Phase III sample cases and in the extrapolation cases says nothing about whether the Phase I findings are nonetheless applicable to those cases on remand. The judgments were reversed because no jury had considered exposure and causation, not because the liability findings were in any way defective. The only portion of the Fifth Circuit's decision to which Pittsburgh Corning can point is the court's statement that it would "pretermit" certain claims by Pittsburgh Corning "which related solely to some or all of the Phase Three cases or some or all of the extrapolation cases or solely to both." 151 F.2d at 321. But this statement refutes rather than supports Pittsburgh Corning's argument. The Fifth Circuit plainly did not reserve any issue regarding Phase I, but rather solely questions relating only to Phase III and the extrapolation cases, such as evidentiary issues concerning Dr. Selikoff's studies, 151 F.2d at 322, and claims of inflammatory argument by plaintiffs' counsel in Phase III. *Id.* The court expressly reached (and rejected) all claims of trial error that were necessary to sustain the Phase I findings.

Pittsburgh Corning's argument also ignores the numerous orders of the Eastern District of Texas making clear that the Phase I jury determinations of the class-wide issues would be binding on *all* plaintiffs and defendants, not simply on the class representatives. *See, e.g., Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990) (Phase I "resolve[d] all common issues," including "[t]he question of punitive damages *in the entire case* of the 2,298 class [members]") (emphasis added).[2]

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[2] On February 19, 1990, the district court certified a class under Fed. R. Civ. P. 23(b)(3) consisting of 2,298 plaintiffs with pending cases in the District. The Order of certification was directed to Phase I. *See* 2/19/90 Memorandum and Order at 12. On March 13, 1992, the district court

4. In its effort to relitigate the issues which have already been decided by the Eastern District of Texas, Pittsburgh Corning contends that there are many remaining common issues of fact which have not been resolved. That contention does not withstand scrutiny.

Pittsburgh Corning points to the following alleged "common questions" of fact: "the large number of cases, the crowding of dockets, the length and delays of trial, high transactional costs, and the potential exhaustion of the assets of the defendants." Opp. Cert. 14. But the Judicial Panel itself has rejected Pittsburgh Corning's argument. The Judicial Panel has opined that "the *only* questions of fact common to all actions relate to the state of scientific and medical knowledge at different points in time concerning the risks of exposure to asbestos." *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (emphasis added). These questions have been resolved by the Phase I findings in these cases.

Pittsburgh Corning's argument proves far too much. Litigations involving lead paint, firearms, tobacco, fen-phen and Redux, just to name a few examples, are also characterized by a "large number of cases, crowding of dockets, length and delays of trial, and high transactional costs." If these general and vague "common questions" could justify consolidation, § 1407 could be used as a vehicle to move not only asbestos cases, but virtually all types of products liability and toxic torts cases, to the Eastern District of Pennsylvania.

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entered a Final Consolidated and Class Action Judgment explaining that "Phase I involved not only the trial of the ten (10) class representatives' cases on all issues, but also the determination of the common issues of state of the art and punitive damages. The Phase I jury, along with establishing punitive damage multipliers, specifically decided whether each asbestos-containing insulation product manufactured by each defendant was defective and unreasonably dangerous, the adequacy of warnings, the state of the art defense, and the fiber type defense." Judgment at 2.

Pittsburgh Corning further claims that "[t]here are also important common questions of law." Opp. Cert. 14. But as we noted in the Petition for Certiorari (with no disagreement from Pittsburgh Corning), § 1407(a) expressly refers to questions of "fact," not of *law*, and it would obliterate Congress' handiwork to hand the MDL panel a blank check to transfer cases on the basis of *legal* rather than *factual* similarities.

5. Therefore, these cases squarely present the question of whether the Judicial Panel on Multidistrict Litigation may direct the transfer of cases pending in a federal district court even when:

those actions are already in trial;

the common questions of fact and law have already been resolved in a prior phase of the proceeding; and

any remaining discovery or other pretrial matters involve individualized questions of fact that plainly should not be conducted in the multidistrict context.

On this question, the Third Circuit's judgment is squarely in conflict with numerous decisions in the lower courts, including literally dozens of decisions by the Judicial Panel itself. Pittsburgh Corning asserts that these decisions are "highly fact dependent." Opp. Cert. 21. But that is untrue. The Judicial Panel's own decisions establish, as Pittsburgh Corning elsewhere acknowledges, that "transfer should be denied when individualized issues predominate over common issues" and that "transfer should be denied when the proceedings in the transferor court are well advanced." Opp. Cert. 19, 20. As shown by the Eastern District of Texas' holding, those are precisely the circumstances here. The Third Circuit's decision cannot be reconciled with the settled principles recognized even by Pittsburgh Corning

The Third Circuit's judgment also conflicts with other cases in which the courts of appeals have used mandamus to correct abusive transfer orders. In *In re Food Lion, Inc.*, 73 F.3d 528 (4th Cir. 1996), for example, the court of appeals

exercised its mandamus power to direct the Judicial Panel on Multidistrict Litigation to retransfer certain remanded cases. The Fourth Circuit explained: "Our responsibility for the orderly and efficient administration of justice within this circuit is an adequate basis for the exercise of our power to order relief in the nature of mandamus directed to the Panel and to the district courts for both the District of South Carolina and the Eastern District of North Carolina." 73 F.3d at 532 n. 10. Similarly, mandamus is necessary here to protect interests in judicial economy and the fair administration of justice. *See also In re Warrick*, 70 F.3d 736 (2d Cir. 1995) (granting mandamus where reason for transfer of venue ("judicial efficiency") was inadequate and where district court did not consider interests of either the parties or the witnesses; transfer was a clear abuse of discretion, subject to correction by mandamus); *Sunshine Beauty Supplies, Inc. v. U.S. District Ct.*, 872 F.2d 310 (9th Cir. 1989) (mandamus issued to set aside a transfer order because the prejudice from erroneous transfer could not be corrected on appeal from the final order); *Varsic v. U.S. District Ct.*, 607 F.2d 245, 250-252 (9th Cir. 1979) (mandamus issued because review by appeal after a final judgment in New York could not remedy the severe burdens that the transfer would impose on the plaintiff).

6. Pittsburgh Corning argues that certiorari is inappropriate because the "transfer order at issue was primarily a case management decision — a quintessential example of an area where the scope of discretion is broad." Opp. Cert. 10. The same could have been said in *Lexecon v. Milberg Weiss Berhad Hynes & Lerach*, 118 S. Ct. 956 (1998), where this Court overturned an established practice by which the Judicial Panel permitted transferee courts to assign cases to themselves for trial. This Court noted that "federal courts have treated such transfers with approval, beginning [in 1971]." *Id.* at 961. Nonetheless, this Court put an end to what it deemed to be an abusive and self-aggrandizing exercise of MDL authority.

The same clear statement is needed by this Court in this context as well.

7. This Court's review is warranted for the separate reason that the Third Circuit approved the use of impermissible settlement considerations as a reason for transfer. The Judicial Panel on Multidistrict Litigation cited as factors justifying a § 1407 transfer "the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand actions for trial." App. 10a. But there is no principled justification in the statute for transferring *one* set of cases in order to facilitate settlements in *another* set of cases.

Pittsburgh Corning offers no defense of the merits of the Judicial Panel's reasoning. Instead, Pittsburgh Corning denies that the Judicial Panel actually considered the possibility of settlement as a factor in its decision. Opp. Cert. 25. But the Judicial Panel expressly described settlement as one "of the factors relating to the question of 1407 transfer of these actions." App. 10a. This consideration of settlement was wholly illegitimate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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